

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DOUGLAS K. UHDE,

Petitioner,

v.

ORDER

04-C-23-C

DANA W. DUNCAN, Attorney  
Schmidt, Grace & Duncan,

Respondent.  
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This is a proposed civil action for monetary relief, brought under 42 U.S.C. § 1983. Petitioner Douglas Uhde, who is presently confined at the Stanley Correctional Institution in Stanley, Wisconsin, asks for leave to proceed under the in forma pauperis statute, 28 U.S.C. § 1915. He contends that respondent Dana Duncan violated his constitutional rights by providing an inadequate legal defense during petitioner's criminal trial. From the financial affidavit petitioner has given the court, I conclude that petitioner is unable to prepay the full fees and costs of starting this lawsuit. Petitioner has paid the initial partial payment required under § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must read the allegations of

the complaint generously. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has had three or more lawsuits or appeals dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages.

Petitioner's claim will be dismissed as legally frivolous. According to petitioner's complaint, respondent is a lawyer who took on petitioner's criminal defense through an agreement with the Wisconsin public defender office. Before petitioner could obtain relief against respondent for violating his constitutional right to effective assistance of counsel, petitioner would have to show that respondent was acting "under color of state law" within the meaning of 42 U.S.C. § 1983. However, in Polk County v. Dodson, 454 U.S. 312 (1981), the Supreme Court held that a public defender does not act "under color of state law" when representing an indigent client and is therefore not subject to suit under § 1983. Finding that the attorney's functions and obligations were "in no way dependent on state authority," the Court stressed that "except for the source of payment, [the] relationship became identical to that existing between any other lawyer and client." Id. at 318. In Thomas v. Howard, 455 F.2d 228 (3d Cir. 1972) (per curiam), the court made it clear that

the acts of private counsel in representing a client do not constitute state action. Thus, even if respondent's representation of petitioner was ineffective, it would not be a violation of federal law.

I conclude that petitioner's claim for damages against his lawyer is limited to a state law claim of legal malpractice. This court's power to hear state law claims arises only under 28 U.S.C. §1332, the statute governing diversity jurisdiction. Petitioner does not assert jurisdiction under this statute. However, even if he had, he has not alleged that he and respondent are citizens of different states, as is his burden. Cameron v. Hodges, 127 U.S. 322 (1888). Rather, it appears from petitioner's complaint that both parties are citizens of Wisconsin.

#### ORDER

IT IS ORDERED that

1. Petitioner Douglas Uhde's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED as legally frivolous.
2. The unpaid balance of petitioner's filing fee is \$ 144.54; this amount is to be paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to § 1915(g); and

4. The clerk of court is directed to close the file.

Entered this 23rd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge